Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp. Petition Pursuant to 47 U.S.C. Section 160(c) of the Communications Act for Forbearance from Enforcement of Section 204(a)(3) of the Communications Act, As Amended	)	WC Docket No. 03-256

AT&T PETITION FOR FORBEARANCE

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TABLE OF CONTENTS

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In the Matter of	)	
	)	
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AT&T PETITION FOR FORBEARANCE

Pursuant to Section 10(c) of the Communications Act, 47 U.S.C. § 160(c), AT&T Corp. ("AT&T") hereby requests the Commission to forbear from enforcing Section 204(a)(3) of the Communications Act,[1] which provides that certain "streamlined" local exchange carrier ("LEC") access tariff filings are "deemed lawful," insofar as that provision of the statute precludes customers from seeking reparations through the complaint process under Sections 206-208 of the Act.

INTRODUCTION AND SUMMARY

Reliance on the streamlined tariff filing procedure is now commonplace for local carriers – including price cap LECs, smaller independent carriers, and even CLECs – that use this procedure to insulate themselves from liability to their access

[1] 47 U.S.C. § 204(a)(3).

customers for damages. Only a handful of streamlined filings have been suspended and investigated as a result of the substantially truncated pre-effectiveness tariff review process that is permitted under Section 204(a)(3). Once a streamlined tariff has taken effect, a LEC's access customers can only pursue the formal complaint process to prospectively rectify an unlawful unsuspended streamlined tariff, but may not obtain reparations for past periods in which they were charged under those same unlawful rates. Under recent judicial precedent, that inability to recover damages extends even to tariffs that have allowed the LEC to exceed many times over the Commission's authorized earnings level for that carrier's earnings. And although the Commission nominally retains the authority under Section 205 of the Communications Act to investigate the LECs' unsuspended streamlined rates and to compel revisions to rates it finds to be unlawful, in practice that provision is an ineffective instrument to discipline the LECs' exercise of their access monopolies. Reflecting its limited administrative resources and the massive number of LEC tariffs that would require such hearings, the Commission has not initiated a single proceeding under Section 205 since the enactment of Section 204(a)(3).

The immunity from damages remedies conferred on unsuspended streamlined LEC access tariffs by Section 204(a)(3) is antithetical to the core objectives of the Telecommunications Act of 1996 and longstanding pro-competitive Commission policies. Forbearance from enforcing Section 204(a)(3)'s "deemed lawful" provision is therefore necessary to assure that access customers, who in many cases also compete with LECs in the interexchange market, will be able effectively to vindicate their right to be

charged lawful rates. This relief fully satisfies each of the criteria enumerated under Section 10 of the Communications Act.

First, continued enforcement of Section 204(a)'s "deemed lawful" standard is unnecessary for – and, indeed, conflicts with – the preservation of just and reasonable access rates. Rather, immunity from damages liability to their access customers creates powerful economic incentives for LECs to file excessive and discriminatory rates and related terms and conditions on a streamlined basis, secure in the knowledge that most of those unlawful charges will escape sufficient scrutiny during the pre-effectiveness review stage and will take effect without suspension. Once they have become effective, those excessive rates are for all intents and purposes placed beyond redress by either the LECs' access customers or by the Commission itself. For example, the reports filed by rate of return LECs showed that many of those carriers' tariffs achieved earnings for the 2001-2002 monitoring period that were far in excess of the levels permitted by the Commission's rules and orders; in NECA's case alone, those overearnings total $27.82 million for its common line pool and $28.68 million for its switched access pool. Yet those LECs' overearnings are immunized from damages insofar as they are based on unsuspended streamlined tariffs.

This outcome in local markets that are at best only nascently competitive is especially untenable because end user customers of IXCs that operate in the intensely competitive interexchange marketplace are free to challenge the lawfulness of those offerings, and if those complaints are successful they are entitled to obtain damages where warranted. There is no rational basis for the Commission to perpetuate a regulatory scheme that displaces this same remedy for LEC monopoly access charges.

Second, and concomitantly, AT&T's petition more than satisfies the standard for forbearance because immunizing unsuspended LEC tariffs from damages remedies is unnecessary to the protection of consumers. To the contrary, the "deemed lawful" provision subverts the protection for access customers through the complaint process that had prevailed since the advent of the Commission's access charge regime. In all of the Commission's public proceedings on Section 204(a)(3), no consumer benefit flowing from enforcing the "deemed lawful" provision has ever been identified – because there is, and can be, none.

Third, forbearance is imperative in the public interest. For the reasons discussed above, that relief will "promote competitive market conditions" and "enhance competition among providers of telecommunications services," both of which are key objectives of the 1996 Act. Moreover, forbearance from enforcing the "deemed lawful" provision of Section 204(a)(3) will not change – much less add to – any regulatory burdens on either LECs or the Commission. Specifically, AT&T does not request forbearance from the provisions of Section 204(a)(3) otherwise permitting LECs to file tariffs on the streamlined intervals specified in that subsection, nor would its petition affect in any way the manner in which those carriers currently file any required support for their streamlined tariffs. Forbearance would also work no change in the Commission's pre-effectiveness tariff review process. The only change from the *status quo* resulting from granting forbearance is that access customers could now seek reparations from the LECs for excessive, discriminatory or otherwise unlawful

streamlined tariffs that have been permitted to take effect without suspension.[3] This result cannot remotely be characterized as any legally cognizable "burden" that could justify refusing to grant AT&T's request for relief.

BACKGROUND STATEMENT

A. The Commission's Streamlined Tariff Rulemaking

Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("1996 Act") amended one section of the Communication Act's long-established tariffing scheme governing the Commission's power to suspend tariffs pending a hearing. Specifically, the 1996 Act added to Section 204(a) a new subsection (3) providing that:

> "A local exchange carrier may file with the Commission a new or revised charge, classification, regulation or practice on a streamlined basis. Any such charge, classification regulation or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it was filed with the Commission unless the Commission takes action under paragraph 1 [of Section 204(a)] before the end of that 7-day or 15-day period, as is appropriate."[4]

Following enactment of the 1996 Act, the Commission commenced a rulemaking proceeding to implement the streamlining requirements of the new

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[3] Because forbearance operates only prospectively, LECs would not be subject to potential retroactive damages liability for any unsuspended streamlined tariffs that became effective prior to granting AT&T's instant petition.

[4] Section 204(a)(1) of the Act (47 U.S.C. §204(a)(1)), referred to in the last sentence of this new statutory provision authorizes the Commission to investigate carrier tariff filings for new or revised charges, to suspend the effectiveness of those tariffs for up to five months, and to impose an accounting order in connection with any tariff that is permitted to take effect prior to the conclusion of that investigation.

subsection.[5] Specifically, the Commission proposed a construction of the "deemed lawful" provision of the subsection that represented a radical change in the law that had long governed tariffing, by permitting LECs to collect, without liability for reparations, any rate that becomes effective unless the Commission suspends that rate within either 7 or 15 days following its filing. As the *Streamlining NPRM* explained, although under that construction of the statute failure to suspend a streamlined tariff would not be considered equivalent to a finding of the tariff's lawfulness, in the absence of such suspension "damages could not be awarded for the period prior to the time the Commission determine[s] in a Section 205 or 208 proceeding" that a tariffed rate or condition requires rectification.[6]

Thus, the legal effect of an unsuspended tariff filing "would limit the remedies available to LEC customers for rates, terms and conditions that violate Section 201-202 of the Act."[7] The Commission's *Streamlined Tariff Order* released January 31, 1997 concluded that this reading of the term deemed lawful is "compelled by the language of the statute viewed in light of relevant appellate decisions" that had found

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5 *See Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, 11 FCC Rcd 11,233 (1996)("*Streamlined Tariff NPRM*"). As the Commission later pointed out, resort to the legislative history of Section 204(a)(3) for guidance would have been unavailing because "there is none on point." *See Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2182 (1997)(¶ 19)("*Streamlined Tariff Order*").

6 *Streamlined Tariff NPRM*, 11 FCC Rcd at 11,238 (¶ 11).

7 *Id*

similar statutory language rendered in the context of other regulatory regimes establishes a conclusive presumption of reasonableness for filed rates.[8]

The *Streamlined Tariff Order* expressly acknowledged the far reaching consequences of implementing this standard for purposes of the Communications Act:

> "We recognize that our interpretation of section 204(a)(3) will change significantly the legal consequences of allowing tariffs filed under this provision to become effective without suspension. Under current practice, a tariff filing that becomes effective without suspension or investigation is the legal rate but is not conclusively presumed to be lawful for the period it is in effect. Indeed, if such a tariff filing is subsequently determined to be unlawful in a complaint proceeding commenced under section 208 of the Act, customers who obtained service under the tariff prior to that determination may be entitled to damages. In contrast, tariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness."[9]

AT&T and other non-LEC commenters in the Commission's rulemaking pointed out that the practical effect of precluding customers from obtaining reparations retroactively for unlawful charges was to expose IXC access customers (and, consequently, the end users that they serve), to unjust, unreasonable or discriminatory charges imposed by LEC monopolists without any meaningful constraints.[10] However, the Commission concluded that it was obligated to implement

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8 *Streamlined Tariff Order*, 12 FCC Rcd at 2182 (¶ 19 & n. 60), *citing Municipal* Resale *Services Customers v FERC*, 43 F.3d 1046 (6th Cir. 1995) and *Ohio Power Co. v. FERC, 954 F 2d 779* (D.C. Cir. 1992).

9 *Streamlined Tariff Order*, 12 FCC Rcd at 2182-2183 (¶ 20)(footnote omitted).

10 *See , e.g ,* AT&T Comments filed October 9, 1996, in CC Docket 96-87, pp. 1-9; AT&T Reply Comments filed October 24, 1996 in *id* , pp. 10.

such a fundamental alteration in the existing remedial scheme for unlawful tariffs because "this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful."[11] The Commission last year denied reconsideration of its 1997 decision that adopted this construction of the statutory language.[12]

B. The Aftermath of the *Streamlined Tariff Order*

Since the 1997 release of the *Streamlined Tariff Order*, all major ILECs have routinely implemented their tariff filings under the provisions of that order. The streamlined tariff filing procedure has also been adopted for virtually all tariff filings by smaller ILECs, including the National Exchange Carrier Association ("NECA") and independent ILECs that have promulgated their own tariffs. Notably, the streamlined procedure, with its conclusive presumption of lawfulness, has also been embraced by numerous CLECs, even though those carriers have been classified as non-dominant and therefore have been entitled to file on one-day's notice, rather than the notice periods prescribed in Section 204(a)(3).

Predictably, only a relative handful out of the thousands of streamlined LEC tariff filings in the past six years have been suspended by the Commission for even

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11 *Streamlined Tariff Order*, 12 FCC Rcd at 2182-2183 (¶ 20). Moreover, the *Streamlined Tariff Order* concluded that this immunity from reparations for unsuspended tariff filings under the statutory notice periods extends even to CLECs, which have been treated as nondominant carriers and which therefore, to the extent they filed tariffs, had routinely done so on one-day's notice. *Id*, 12 FCC Rcd at 2191-2192 (¶ 40).

12 *See Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, 17 FCC Rcd 17040 (2002)("*Streamlined Tariff Reconsideration Order*).

a single day. As AT&T and other non-LEC commenters showed in the Commission's rulemaking – and as the *Streamlined Tariff Order* did not contest – the statutory intervals for pre-effectiveness review under Section 204(a)(3) allow access customers only the most minimal opportunities to review and analyze often-complex LEC tariff filings and to draft and file petitions to suspend or reject the streamlined filings.[13] Thus, although the *Streamlined Tariff Order* rejected LEC arguments that the Commission should rely exclusively on post-effectiveness tariff review,[14] affected access customers' ability to protect themselves against unjust and unreasonable access charges through the pre-effectiveness review process has become increasingly illusory. Indeed, recent developments even further underscore the inadequacy of the protection that Section 204(a)(3)'s "deemed lawful" standard affords access customers against unreasonable access rates.

Specifically, in 2001 the Commission addressed a formal complaint by General Communication, Inc. ("GCI") against Anchorage Communications Systems ("ACS") seeking damages based on the defendant LEC's excessive earnings during the 1997-1998 monitoring period, which had been in part based on unsuspended streamlined

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13 The seven day period for interested parties to complete this process, which is stringent standing alone, may be cut to five business days where streamlined tariff filings on 15 day's notice are made before a weekend (and as few as four business days if the filing precedes a holiday weekend). *See* 47 C.F.R. § 1.773(a)(2)(i), 1.773(a)(3). For streamlined filings made on seven days' notice, the three day period provided for filing petitions may be cut to as little as one business day when a streamlined tariff filing is made before a weekend. *Id.*

14 *See* 12 FCC Rcd at 2197 (¶ 52).

rates.[15] The Commission concluded that, as GCI alleged, ACS had unlawfully assigned information service provider ("ISP") traffic costs to the interstate accounts, and it found that correcting ACS' jurisdictional misassignment and other challenged accounting practices would have produced interstate earnings for the monitoring period of more than 32 percent, nearly *three times* the maximum allowable rate of return.[16] The decision also rejected ACS' argument that Section 204(a)(3) precluded the Commission from awarding damages to GCI to the extent those substantial overearnings were predicated on the LEC's unsuspended streamlined rates.[17]

On appeal, a unanimous panel of the D.C. Circuit affirmed the Commission's determination with respect to ACS' misclassification of ISP traffic costs and its resultant substantial overearnings for the monitoring period.[18] However, the court concluded that the Commission was precluded under the *Streamlined Tariff Order* from awarding damages for the overearnings for the period covered by the LEC's unsuspended streamlined tariffs. Its decision found that, although the Commission's liability provisions for rate-of-return violations are "[a] means to the end of reasonable rates,"

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15 *See General Communication, Inc. v Alaska Communications Systems Holdings, Inc.*, EB-00-MD-016, Memorandum Opinion and Order, FCC 01-32, released January 24, 2001.

16 *Id* at ¶¶ 12, 16-39.

17 The Commission reasoned that neither the text nor legislative history of Section 204(a)(3), nor the *Streamlined Tariff Order* itself, had in any way addressed the Commission's long-standing rate-of-return prescription, much less intimated that the phrase "deemed lawful" was intended to alter the ongoing effect of the Commission's liability regime for rate-of-return violations. *Id.* at ¶ 59.

18 *See ACS of Anchorage, Inc. v FCC*, 290 F.3d 403 (D.C. Cir 2002)("*ACS*").

application of that scheme to ACS' streamlined rates was foreclosed. "Since § 204(a)(3) deems ACS' rates to be lawful, the inquiry ends."[19] The court recognized that the Commission has traditionally relied on retroactive review of the lawfulness of rates under the rate-of-return enforcement mechanism without advance suspension or investigation, "[b]ut that is not the world of § 204(a)(3), where the rate itself, if filed and not suspended is 'deemed lawful.'"[20]

Taken together, these developments have subjected access customers to almost unfettered ability on the part of LECs of all stripes to set rates at unjust and unreasonable levels. For example, under applicable Commission decisions and Part 65 of the Commission's rules, ROR LECs are required to target their access rates to achieve maximum earnings of 11.25 percent for special access, and 11.45 percent for switched access services, over a two-year monitoring period. However, as shown in the attached Exhibit 1, for the most recent monitoring period (calendar years 2001 and 2002), ROR LECs' own reports filed with the Commission demonstrate that a total of 30 LECs earned a combined total of almost $160 million in excess of the permissible maximum earnings level. Moreover, such carriers achieved annualized earnings ranging from 11.73 percent to as much as 54.34 percent for special access, and from 11.82 percent to as much as 35.30 percent for switched traffic sensitive access. NECA alone achieved overearnings amounting to $27.82 million for its common line pool and $28.68 million for its switched access pool. Under the regulatory regime for ROR LECs as it existed prior to the

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19 *Id* at 412.

20 *Id.* at 413.

adoption of Section 204(a)(3), those carriers' access customers would have been entitled to bring complaints against these LECs to recover those IXCs' respective share of the entire amounts of these excessive earnings.[21] However, under the "deemed lawful" provision of Section 204(a)(3), those LECs' overearnings are immunized from damages recovery to the extent that those amounts are attributable to unsuspended streamlined tariff filings.[22]

The *Streamlined Tariff Order* stated that to protect against unlawful tariffs the Commission "will continue to rely additionally on post-effective tariff review, including the section 208 complaint process and in section 205 tariff investigations."[23] However, to date the Commission has not instituted *any* section 205 proceedings involving such unsuspended LEC tariffs. And, not surprisingly in view of the unavailability of a damages remedy, virtually no Section 208 complaints addressed to unsuspended streamlined tariffs have been filed in the more than six years since that decision was released.

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21 *See AT&T v Northwestern Bell Tel. Co.*, 8 FCC Rcd 1014 (1993).

22 *See ACS, supra.*

23 *See* 12 FCC Rcd at 2198 (¶ 52)

ARGUMENT

Section 10(a) of the Communications Act requires the Commission to forbear from applying any provision of its rules or of the Act if it finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

In particular, forbearance from enforcement of the statute or Commission rule is warranted where it will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[24]

Forbearance from enforcement of the "deemed lawful" provision of Section 204(a)(3), which immunizes unsuspended LEC streamlined tariff filings from formal complaints by customers seeking reparations, fully satisfies each part of this three-fold standard.[25] Indeed, the current application of Section 204(a)(3) affirmatively disserves and frustrates the achievement of these core objectives of the 1996 Act.

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24 *See* 47 U.S.C. § 160(b).

25 *See Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003)(requirements are conjunctive).

A. Enforcement of the "Deemed Lawful" Provision Is Not Necessary to Ensure Just and Reasonable Access Rates.

Commission forbearance from enforcement of the "deemed lawful" provision of Section 204(a)(3) is more than merely unnecessary to ensure that LEC access rates and other rate affecting tariffed practices are just, reasonable and nondiscriminatory. Forbearance is in fact indispensable to assure that access customers, who in many cases compete with LECs in the interexchange market, will be able effectively to enforce their right to be charged lawful rates.

Thousands of streamlined tariffs have been filed in the six years since the release of the *Streamlined Tariff Order* and only a miniscule proportion of those filings have been suspended and set for investigation as a result of the pre-effectiveness review process. Such a result is hardly surprising in light of the enormous volume of such tariff filings, the abbreviated timelines under which pre-effectiveness review must be conducted, and the Commission's scarce administrative resources.

Post-effectiveness Commission oversight investigation of this immense body of unsuspended streamlined tariffs under Section 205 is also clearly inadequate to protect access ratepayers from unjust and unreasonable LEC charges and practices. The same constraints on the administrative resources that hamstring pre-effectiveness tariff review also drastically limit the Commission's ability to conduct time-consuming and complex investigations of the myriad streamlined LEC tariffs that have gone into effect without suspension. Numerous other pending proceedings already place enormous demands on the same expert agency personnel who would be required to conduct the Section 205 investigations. In fact, since adoption of the *Streamlined Tariff Order* the Commission has not initiated a single Section 205 investigation of a single unsuspended

streamlined tariff And in any event, conducting Section 205 proceedings for even a handful of streamlined filings would still leave access customers subject to those tariffs while those investigations are pending, and also leave the LECs' customers at their mercy with respect to all other existing unsuspended streamlined filings, and all additional streamlined tariffs that may go into effect during the course of those proceedings.

The *Streamlined Tariff Order*'s reliance on the formal complaint process to discipline LEC pricing behavior has also been seriously misplaced, especially in light of the *ACS* court's finding that unsuspended streamlined filings are not subject to the rate of return enforcement mechanism. Under Section 208(b)(1) of the Act, the Commission is required to resolve formal complaints challenging tariffed rates or other terms and conditions within five months from the filing of such actions.[26] However, by the time the complaint process can run its course, the damage to competition will already have been done, even if the Commission determines that the LEC's access charges or other tariffed practices are unlawful. In the intensely competitive interexchange market, carriers that are subjected to excessive access costs or are hamstrung by unreasonable terms and conditions for obtaining such access quickly lose their ability to market their

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[26] The Commission has adopted rules creating an accelerated docket for rendering determinations in formal complaint proceedings within 60 days from the filing of those actions. *See Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 13 FCC Rcd 17018 (998), *recon.*, 16 FCC Rcd 5681 (2001). However, admission to the accelerated docket is in the discretion of the Commission and, insofar as AT&T is aware, no proceedings involving streamlined tariffs have been adjudicated through that procedure. Moreover, just as under the traditional formal complaint process, retroactive damages for an unlawful streamlined tariff are unavailable under the accelerated docket process.

services to customers, since their prices and performance will be less attractive than offerings by the LECs' interexchange affiliates. Yet the "deemed lawful" provision of Section 204(a)(3) requires competitors to pay excessive access charges, or to operate under unjust and unreasonable terms and conditions, while a complaint is pending, with no hope for reparations from the LECs for the damage they have caused to their IXC access customers.

Moreover, because a Commission finding of illegality only displaces the challenged tariff prospectively, the "deemed lawful" provision simply opens the way to the LEC's re-filing of a different – but still unlawful – tariffed rate, term or condition. The potential for endless and fruitless rounds of litigation renders the complaint process a toothless mechanism to protect access customers from unlawful provisions of unsuspended streamlined tariffs. Given these circumstances, access customers have filed only a handful of formal complaints against unsuspended streamlined LEC tariffs in the more than six years since the *Streamlined Tariff Order* was released.[27]

In sum, none of the regulatory mechanisms that the *Streamlined Tariff Order* contemplated actually protect access ratepayers against unreasonable LEC rates

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[27] Under the current circumstances imposed by Section 204(a)(3), resort to the complaint process to vindicate access customers' interests against an unsuspended LEC tariff has limited value. The Commission's rules governing the format and content of formal complaints also require litigants to provide detailed supporting information and extensive documentation. *See* 47 C.F.R. §§ 1.720-1.735; *Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22,497 (1997), *recon.*, 16 FCC Rcd 5681 (2001). Satisfying these requirements is a time-consuming and costly process in all events. However, the inability to recover damages for unlawful LEC conduct creates an economic disincentive for a complainant to assume these burdens.

and practices. The sole effect of Section 204(a)(3)'s "deemed lawful" provision is therefore to insulate LECs from liability for abusing their local exchange monopolies to extract excessive access charges from their customers. Thus, continued enforcement of the statute is directly antithetical to the requirement that carriers charge just and reasonable tariffed access rates, and impose only just and reasonable terms and conditions. Forbearance is thus clearly warranted – and, indeed, imperative – under Section 10(a)(1).

B. Enforcement of the "Deemed Lawful" Standard Is Not Necessary for the Protection of Consumers.

It follows as a matter of course that AT&T's request for forbearance satisfies the second statutory criterion for forbearance, because there is no conceivable manner in which continued enforcement of the "deemed lawful" provision of Section 204(a)(3) can be claimed to provide *any* protection to access customers and their end user customers. Indeed, neither the LEC commenters in the Commission's underlying rulemaking nor the *Streamlined Tariff Order* itself demonstrated that any consumer protections would flow from application of Section 204(a)(3) in a manner that immunizes LECs from liability for their unlawful conduct. It is thus impossible to conclude that enforcement of that provision is "*necessary* for the protection of consumers" under this prong of the forbearance standard.[28]

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[28] *See* 47 U.S C. § 160(a)(emphasis supplied).

C. Forbearance from Applying the "Deemed Lawful" Provision Is Fully Consistent with the Public Interest.

Finally, the "public interest" criterion for forbearance in the circumstances presented here is satisfied on multiple grounds. Immunizing LECs from liability to their access customers for all damages that flow from unjust, unreasonable or discriminatory tariff provisions merely because such terms were in an unsuspended streamlined filing cannot be squared with any reasonable interpretation of the "public interest."

Indeed, such an application of the "deemed lawful" provision of Section 204(a)(3) is antithetical to the Commission's overarching goal of implementing the pro-competitive and deregulatory objectives of the Telecommunications Act by allowing market forces to operate wherever possible. In a competitive marketplace that operates under ordinary principles of commercial law, sellers are not invested by law with the exclusive power to determine the rates, terms and conditions that their customers must pay. Rather, in those markets buyers have the ability to avoid by not buying, and the legal right to make retroactive challenges to a seller's unilateral and unlawful increase in the price or other terms for goods and services.

Paradoxically, end user customers of carriers that operate in the competitive interexchange marketplace enjoy unfettered ability to raise challenges to the lawfulness of those offerings, and if those complaints are successful they are entitled to obtain appropriate relief – including damages, where warranted. Yet, enforcement of the "deemed lawful" provision in local markets that are at best only nascently competitive allows LECs to avoid precisely the same legal obligation to their access customers. Condoning immunity from damages for one segment of carriers that still enjoy effective

monopolies, while retaining that remedy for rates set by common carriers that face real competition, seriously distorts the operation of the marketplace.

Thus, forbearance from enforcing the "deemed lawful" provision will simply restore to access customers the remedies for unlawful access rates they enjoyed prior to enactment of Section 204(a)(3), and thereby reinstate legal incentives for LECs to adopt just and reasonable tariffs. Such action by the Commission will "promote competitive market conditions" and "enhance competition among providers of telecommunications services," both of which are key objectives of the forbearance procedure and are consistent with – and, indeed, indispensable to protect – the public interest.[29]

Forbearance from enforcement of Section 204(a)(3)'s "deemed lawful" provision also will not impose any additional regulatory burdens on the pre-effectiveness tariff review process. It would neither prevent LECs from filing streamlined tariffs nor require the Commission to undertake any additional pre-effectiveness reviews. Rather, forbearance would merely end the LECs' immunity from liability for refunds for *unlawful* tariffs.

Price cap LECs may therefore continue under the streamlined timelines to file below-cap, within band tariffs which the Commission's current rules already provide are to be considered *prima facie* (but *not* conclusively) lawful absent a compelling

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[29] *See* 47 U.S.C. § 160(b).

threshold showing by a petitioning party.[30] Non-price cap incumbent LECs – including, in particular, small independent LECs – may also continue to file tariffs under the Commission's established pre-effectiveness review standards for those carriers.[31] Forbearance likewise would not impose additional pre-effectiveness burdens on CLECs, whose tariffs are subject to even more stringent standards for suspension.[32] Indeed, forbearance from enforcement of the "deemed lawful" provision would greatly reduce regulatory compliance burdens on CLECs, because it is likely that those carriers would

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30 Under the Commission's incentive regulation regime, LEC price cap tariffs that satisfied overall basket price cap indices and service pricing bands fall within a "no-suspension zone and are presumed lawful, subject to limited pre-effectiveness Commission review. Price cap LECs' tariffs falling outside of the no-suspension zone were subject to more rigorous Commission review prior to the tariffs' effectiveness. *See Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637 (1991); 47 C.F.R. §§ 1.773(a)(iv)-(v), 61.41-49.

31 Larger incumbent LECs' tariffs are subject to traditional pre-effectiveness review standards for suspension or rejection, as appropriate, of filings that raise substantial questions of lawfulness or that conflict with the Communications Act, Commission orders or rules. *See AT&T (Transmittal No. 148),* FCC 84-421, rel. Sept. 15, 1984; *ITT (Transmittal No. 2191)*, 73 FCC2d 709, 716, n.5 (1979); *American Broadcasting Companies, Inc.* v. *AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI* v. *AT&T*, 94 F.C.C.2d 332, 340-41 (1983).

However, the tariff review rules for "Tier 3" independent LECs serving under 50,000 lines provide that those carriers' tariffs rates based on historical demand and cost data are considered *prima facie* lawful. Such carriers' tariffs therefore are not subject to suspension unless the filing has omitted prescribed cost support or unless a petitioner demonstrates that, in addition to the threshold showings for price cap LECs, an unreasonable proposed rate would not be corrected in a subsequent filing. *See* 47 C.F.R. §§ 1.773(a)(iii), 61.39.

32 CLECs' tariff filings are not only considered *prima facie* lawful, but to warrant suspension of those carriers' filings a petitioner must demonstrate that the harm to competition from the proposed tariff would be more substantial than the injury to the public arising from the unavailability of the proposed tariffed offering. *See* 47 C.F.R. §§ 1.773(a)(ii)

revert to their pre-1997 routine practice of implementing tariff filings on one days' notice rather than on the longer timelines for streamlined filings under Section 204(a)(3).[33]

Given the pro-competitive benefits that would flow from such a determination – and the absence of any legitimate detriment to LECs – the requested forbearance is fully consistent with the public interest.

CONCLUSION

For the reasons stated above, the Commission should forbear from enforcement of Section 204(a)(3) of the Communications Act, deeming lawful certain "streamlined" LEC tariff filings, insofar as that statute precludes customers from seeking reparations through the complaint process under Sections 206-208 of the Act.

Respectfully submitted,

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33 *See* 47 C.F.R. § 61.58.

Exhibit 1

ROR Over Earnings 2001 - 2002

($s in thousands)

NAME OF COMPANY	Common Line Earnings %	Common Line Over Earning $s with 35% FIT Gross-up	Special Access Earnings %	Special Access Over Earning $s with 35% FIT Gross-up	Switched Traffic Sensitive Earnings %	Switched Traffic Sensitive Over Earning $s with 35% FIT Gross-up	Total Interstate Access Earnings %	Total Sept. Industry OE $s with 35% FIT Gross-up (no interest)
Telephone Utilities Exchange Carrier Assoc			33 61%	$ 16,237	18.13%	$ 12,345	22 45%	$ 28,977
CenturyTel Of Midwest-Michigan, Inc.			27 37%	$ 866	29.32%	$ 2,718	28 81%	$ 3,616
CenturyTel Of Ohio, Inc **	15 77%	$ 705	15 66%	$ 806	17 82%	$ 1,225	16 44%	$ 2,822
CenturyTel Of Wisconsin, Inc			25 31%	$ 2,440	15.33%	$ 300	22 18%	$ 2,779
Chillicothe Telephone Company, The *			36.27%	$ 1,826	7 42%	$ -	26 84%	$ 1,827
Gallatin River Communications			13.74%	$ 351	22.39%	$ 1,977	18.26%	$ 2,757
Gulf Telephone Company			17 72%	$ 531	16 11%	$ 1,018	16 55%	$ 1,851
Illinois Consolidated Telephone Company			10.02%	$ -	23 92%	$ 669	13 00%	$ 702
National Exchange Carrier Association	12 05%	$ 27,872	12.57%	$ 7,531	12 76%	$ 28,683	12.27%	$ 79,656
Virgin Islands Telephone Corporation			17 36%	$ 252	-0 06%	$ -	2 35%	$ 253
Alaska Comm System			18.85%	$ 2,357	35.30%	$ 6,803	26 54%	$ 9,253
Alltel Alabama, Inc			18.08%	$ 72	7 60%	$ -	8.93%	$ 75
Alltel Arkansas, Inc			12.53%	$ 266	16 12%	$ 1,377	14 34%	$ 1,812
Alltel Missouri, Inc			12 94%	$ 131	11.97%	$ 43	12 39%	$ 217
Alltel New York, Inc			2 98%	$ -	18 55%	$ 871	8 71%	$ 916
Alltel Oklahoma Properties			12 39%	$ 48	10 00%	$ -	10.49%	$ 50
Texas Alltel, Inc			4.55%	$ -	13.41%	$ 175	10.06%	$ 175
Western Reserve Telephone Company			8.08%	$ -	11.93%	$ 106	9 98%	$ 112
Puerto Rico Telephone Company *			54 34%	$ 10,280	7.98%	$ -	12 25%	$ 10,282
Roseville Telephone Company			17.44%	$ 3,418	22.98%	$ 2,657	19 02%	$ 6,590
TXU Communications (Lufkin-Conroe)			12.94%	$ 363	6 01%	$ -	11.01%	$ 363
Coastal Utilities Inc (JSI) *			13.84%	$ 214	10 65%	$ -	11 74%	$ 214
Concord Telephone Co. (JSI) *			44 49%	$ 2,900	14 93%	$ 418	27 00%	$ 3,350
Farmers Telephone Cooperative (JSI)			12 67%	$ 92	8.69%	$ -	9.96%	$ 92
Fort Bend Telephone Company (JSI) *			15 55%	$ 260	11 01%	$ -	12 13%	$ 260
Fort Mill Telephone Company (JSI)			14.75%	$ 83	16.76%	$ 57	15 34%	$ 146
Horry Telephone Co (JSI)			11.73%	$ 11	5.20%	$ -	6 90%	$ 11
Taconic Telephone Corp (JSI)			17 33%	$ 222	11 82%	$ 18	13.25%	$ 263
Warwick Valley Telephone Company (JSI)			27.19%	$ 272	7 69%	$ -	10.03%	$ 273
Winterhaven			23 84%	$ 28	13 02%	$ 8	15 93%	$ 39
		$ 28,577		$ 51,857		$ 61,469		$ 159,733

Notes:

* March 2003 Preliminary Data Company did not file corrections in September 2003

** Company has their own common line rate, and is not part of the NECA Common Line Pool